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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1447

TERRELL MACHINE CO.

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX THERETO

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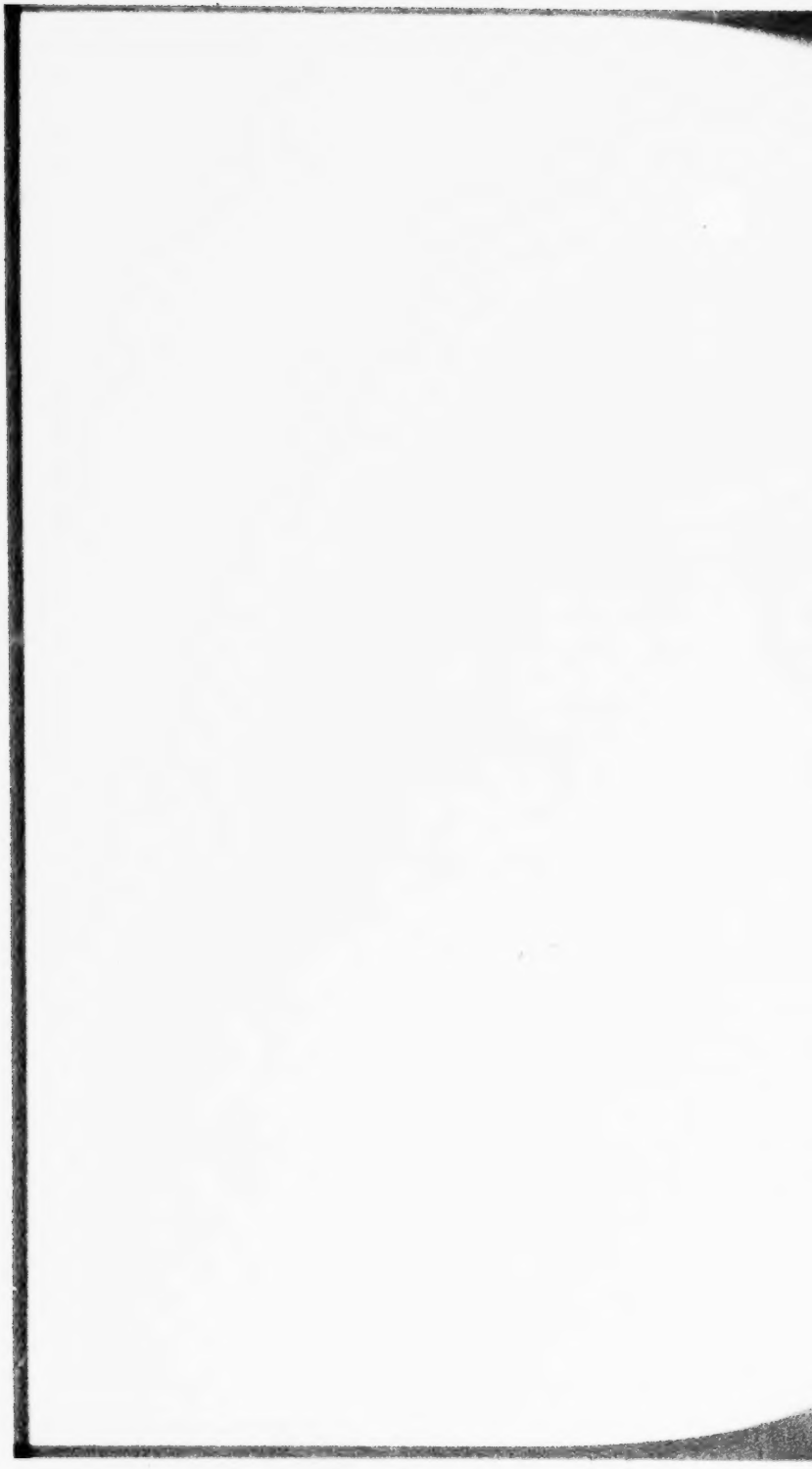

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OCTOBER TERM, 1969

TERRELL MACHINE CO.

v.

NATIONAL LABOR RELATIONS BOARD

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX THERETO

Terrell Machine Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but is unofficially reported at 73 LRRM 2381. The decision and order of the National Labor Relations Board is reported at 173 NLRB No. 230 and unofficially at 70 LRRM 1049.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1970.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

After expiration of the certification year, must an incumbent union, if requested, establish as a matter of fact that it then represents a majority of the employees in the appropriate unit in order to continue as their bargaining representative?

STATUTE INVOLVED

Sections 7, 8(a)(5) and 9(a) of the National Labor Relations Act, 29 U. S. Code 157, 158(a)(5) and 159(a) read as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities....
>
> * * *
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (5) To refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).
>
> * * *
>
> Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....

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STATEMENT

A. Facts

The Union was certified on April 19, 1945. Thereafter the Company and union entered into successive one-year collective bargaining agreements. The last agreement ran from June 27, 1966 to June 27, 1967.

On July 3, 1967, during negotiations for a new contract, the Company expressed its doubt that the union represented a majority and suggested that this issue be resolved by the Federal Mediator examining the union's evidence of majority status. (J. A. 107-8).* The union refused, stating that as a matter of principle it would not permit examination of its records by anyone. The union representative stated that the union would rely on its earlier certification as evidence of its majority status (J. A. 110-111). The Company thereupon withdrew recognition.

At a later date the Federal Mediator advised the Company that the union might agree to an examination of its records to establish majority status. The Company said it would not then agree to such a check because of intervening circumstances which suggested such a check would not show the uncoerced desire of its employees (J. A. 162).

At the trial, counsel for the General Counsel was unable to establish as a matter of fact that a majority of the employees in the unit were either dues payers and/or had signed membership cards prior to the time the Company raised the question of majority status.

B. The Trial Examiner's Decision

The Trial Examiner found as a matter of fact that on July 3, 1967, the union had 41 dues payers plus three mem-

*Joint Appendix filed in the Court of Appeals.

bership application cards or a total of 44 employees. This he found did not constitute a majority of the unit (J. A. 189). Thus, he concluded that the Company did not violate Section 8(a)(5) of the Act by withdrawing recognition on July 3, 1967.

The Trial Examiner found that at a later date the employer violated Section 8(a)(5) of the Act. This finding and conclusion was not adopted by the Board.

C. The Board's Decision

The Board reversed the Trial Examiner — not as to the foregoing findings of fact but as a matter of law. The Board stated its interpretation of the law as follows:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i. e., "good faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the union.
>
> (J. A. 204)

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The Board rationalized that General Counsel was relying on both the 1945 certification as a presumption of continued majority status and the supplementary evidence of the union's membership figures as evidence of the union's majority status on July 3. Using this characterization of the General Counsel's position as its major premise, the Board stated:

> . . . [I]t was incumbent upon the Respondent to go forward with the evidence to establish actual loss of such status, if it wished to rebut that presumption. Of course, if the General Counsel's evidence refuted his own contention, that would undoubtedly be sufficient. But that is not the case here. For, a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof. . . . we find, the presumption of the Union's representative status on and after July 3 has not been rebutted. (J. A. 205)

Secondly, the Board concluded that the Company did not have a reasonably grounded doubt based on objective considerations for questioning the union's continued majority status.

D. The Decision of the Court of Appeals

The Court of Appeals affirmed the Board's decision accepting the Board's interpretation and application of the law.

REASONS FOR GRANTING THE WRIT

The Writ should be granted for two reasons. First, the Board's interpretation and application of the law is contrary to the statute. Secondly, it is contrary to the decision of this Court in *ILGWU v. NLRB* 366 U. S. 731, 81 S. Ct. 1603, 48 LRRM 2251 (1961).

Section 7 of the Act provides that employees shall have the right among others "to bargain collectively through representatives of their own choosing" and, as added by the Taft-Hartley Act, the right "to refrain" from bargaining collectively through a representative. Neither right is paramount. The Act provides election machinery to determine the desire of the employees. Section 9(c) (3) provides that no election shall be conducted in any bargaining unit in which a valid election has been held within the preceding twelve months.

Upon request of a union and a showing that 30% of the employees have indicated an interest in representation by the union, the NLRB will conduct an election in an appropriate unit.[1] Upon conclusion of the election the NLRB issues a certification — a certification of representation if the union wins, a certification of results if the union looses.[2]

In cases where a certification of representation issues, the Board and Courts have created an irrebuttable presumption of the union's continued majority status during the certification year absent extreme "unusual circum-

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[1]29 U. S. C. §159(c) (1) (A), LMRA §9(c) (1) (A); 29 C. F. R. Chapter 1, *NLRB Rules and Regulations and Statements of Procedure* §101. 18(a) (Series 8, as amended, July 4, 1967).

[2]29 U. S. C. §159(c) (1), LMRA §9(c) (1); 29 C. F. R. Chapter 1. *NLRB Rules and Regulations and Statements of Procedure* §102. 69(b).

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stances."[3] In cases where a certification of results issues (i. e., the union looses), the Board and Courts have held that there is no irrebuttable presumption during the certification year that a continuing majority do *not* wish to be represented by the union.[4]

Clearly, the statute makes no such distinction between the right to be represented and the right not to be represented.

After the certification year has expired, there is a rebuttable presumption of the union's continued majority status,[5] but there is no rebuttable presumption that a continuing majority do not wish union representation. In the latter situation the NLRB upon request of a union and a 30% showing of interest will conduct another election in the same appropriate unit.[6] The union is not required to demonstrate that a majority of employees *no longer* desire *not* to be represented.

Again the statute does not make or suggest such a distinction between the employee rights.

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[3]29 U. S. C. §159(c)(3), LMRA §9(c)(3); *NLRB v. Little Rock Downtowner, Inc.*, ___ F. 2d ___, 72 LRRM 2044, (8th Cir. 1969); *Lodges 1746 & 743, IAM v. NLRB*, 71 LRRM 2336 at 2338 (1969); *NLRB v. Gulfmont Hotel Co.*, 362 F. 2d 538, 62 LRRM 2453 (5th Cir. 1966); *Stoner Rubber Co.*, 123 NLRB 1440, 44 LRRM 1133 (1959); *Brooks v. NLRB*, 348 U. S. 96, 35 LRRM 2158 (1954), *cited with approval, NLRB v. Gissel Packing Co.*, 395 U. S. 575 at 599, 89 S. Ct. 1918 at 1932 (1969).

[4]*Wheeler-Van Label Co. v. NLRB*, 408 F. 2d 613, 70 LRRM 3055 (2nd Cir. 1969); *Conren, Inc.*, 156 NLRB 592 (1966), *enforced*, 368 F. 2d 173 (7th Cir. 1966), *cert. denied*, 386 U. S. 974 (1967).

[5]Cases cited in footnote 3 *supra*; *Badly Case & Cooler, Inc.*, 172 NLRB No. 106, 68 LRRM 1387 (1968); *NLRB v. Downtown Bakery Corp.*, 330 F. 2d 921, 56 LRRM 2097 (6th Cir. 1964); *Celanese Corp.*, 95 NLRB 664, 28 LRRM 1362 (1951).

[6]29 U. S. C. §159(c)(1)(A), LMRA §9(c)(1)(A); 29 C. F. R. Chapter 1, *NLRB Rules and Regulations and Statements of Procedure* §101. 18 (a) (Series 8, as amended, July 4, 1967).

If employees are not represented by a union and a union demands recognition as their representative, an employer may request and the Board will conduct an election to determine the desires of the employees. No showing of employee interest need be made.[7]

Now what would have happened in the case at bar if the employer had requested an election to resolve its doubt? Since there is a rebuttable presumption of the union's continued majority status, the employer would have to prove that a majority no longer wish to be represented by the union or the employer would have to prove that its doubt was based on objective considerations.[8] If the employer could not establish one of these propositions, then the Board would refuse to conduct an election. The law applied in the case at bar is the same as would have been applied in denying this employer an election if it had requested one.

On the other hand, after the employer withdrew recognition, the union could have filed a petition for an election. Such a petition would have been processed by the Board without further ado and would have resulted in an election!

Clearly the Board's regulations and law are not in harmony with the statute. Unions may upon request have the Board resolve questions of majority representation by election. An employer may not. The disparate treatment between union and employer requests deprives employees of their Section 7 rights. For the right not to be represented is of the same magnitude as the right to be represented.

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[7]29 U. S. C. §159(c)(1)(B), LMRA §9(c)(1)(B); 29 C. F. R. Chapter 1, *NLRB Rules and Regulations and Statements of Procedure* §§101.18(a), 102.61(1); *e. g., International Aluminum Corp.*, 117 NLRB 1221 (1957).

[8]See footnotes 3 and 5 *supra*; also, *United States Gypsum Company*, 157 NLRB 652 (1966).

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Secondly, the disparate treatment prevents the employer from resolving by election an honest doubt it might entertain about the union's majority status. Since Section 8(a)(5) commands the employer to bargain only with a representative designated by a *majority* of the bargaining unit employees, there must be a means for the employer to determine that he is currently complying with this command.

In the case at bar the employer followed the only avenue open to it — a request that the union demonstrate its majority status and upon its refusal to do so withdrawal of recognition. The union could have had the question of majority status resolved by an election but it chose not to do so. In an election the union would have had to receive a majority of the votes to continue as bargaining representatives. But the unfair labor practice route chosen by the union put the burden of showing *no majority* status upon the employer and this burden is impossible of discharge, for as the Board said:

> . . . a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof.

And, we might add, vice-versa. The Board's rule does not seek to determine whether a majority does or does not wish continuing representation by the union or whether the employer is lawfully bargaining with a representative currently designated by a majority of its employees. The effect of the Board's rule is to impose the incumbent union on employees even if in fact a majority of them do not then want it to represent them.

This Board's law as accepted by the Court of Appeals in this case contravenes the statute. The issue should be — did the union at the critical time (July 3, 1967) represent a majority of the bargaining unit employees. But the Board has evolved and the Court of Appeals approved technical assumptions and presumptions that preclude this very inquiry. These assumptions and presumptions have the effect of making the right to be represented paramount to the right not to be represented. Yet Section 7 of the statute makes no such distinction. They have the effect of imposing an incumbent union on a majority that does not then wish to be represented by it — contrary to the clear command of Section 8(a)(5).

In *ILGWU v. NLRB* 366 U. S. 731, 81 S. Ct. 1603, 48 LRRM 2251 (1961) this Court held that an employer violates Sections 8(a)(1) and (2) of the Act if it recognizes and bargains with a union that does not represent a majority of its employees, *even though the employer did so in the good-faith belief that the union represented a majority*. The Court warned:

> We fail to see any onerous burden involved in requiring responsible negotiators to be careful by cross-checking, for example, well analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so.

This case involved initial recognition of a union. But we do not conceive that its principles apply only to initial recognition of the union. If it is an unfair labor practice to recognize and bargain with a minority representative initially, how can it be otherwise with a minority incumbent representative after expiration of the certification year?

In the case at bar the employer proposed checking of the record, but the union refused. As shown at the trial, the union then had less than a majority. The employer withdrew recognition — it followed the mandate of *ILGWU v. NLRB, supra*. But the Board says the employer violated Section 8(a)(5)! Clearly the Board's holding affirmed by the Court of Appeals is in direct conflict with the principles established in *ILGWU v. NLRB, supra*.

CONCLUSION

Therefore, the petitioner respectfully requests that this Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

TERRELL MACHINE COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 1725

Jerome F. Connor, Esq., of Winston-Salem, N. C., for the General Counsel.

William W. Sturges, Esq. (Weinstein, Waggoner, Sturges and Odom), of Charlotte, N. C., for the Respondent.

H. C. Summers, Grand Lodge Representative, of Atlanta, Ga., *George W. Wells*, Special Representative, of Charlotte, N. C., and *Plato E. Papps, Esq.*, of Washington, D. C., for the Charging Party.

Case No. 11-CA-3422

TRIAL EXAMINER'S DECISION

Statement of the Case

MAX ROSENBERG, Trial Examiner: With all parties represented, this case was tried before me in Charlotte, N. C., on April 8 and 9, 1968, on complaint of the General Counsel of the National Labor Relations Board and answer of Terrell Machine Company, herein called the Respondent or the Company.[1] The issues raised by the pleadings are whether Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended, by certain conduct to be detailed hereinafter. At the conclusion of the hearing, the parties orally argued their causes. A brief was submitted by Respondent which has been duly considered.

Upon the entire record made in this proceeding and my observation of the witnesses, including their demeanor while testifying on the stand, I hereby make the following:

Findings of Fact and Conclusions

I. The Respondent's Business

Respondent, a corporation duly organized under the laws of the State of North Carolina, maintains an office and plant in Charlotte, North Carolina, where it is engaged in the manufacture of machinery for the textile industry. During the annual period material to this proceeding, and in the course and conduct of its business operations, Respondent shipped products valued in excess of $50,000 from its plant in Charlotte to points located directly outside the State of North Carolina, and during the same period Respondent purchased directly from points located

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[1]The complaint, which issued on February 23, 1968, is based upon charges filed and served on September 5, 1967.

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outside said State goods valued in excess of $50,000. The complaint alleges, the answer admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge No. 1725, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The General Counsel contends that Respondent failed to bargain in good faith with the Union, the duly designated majority representative of Respondent's employees, and thereby violated Section 8(a) (5) of the Act, when it (a) insisted throughout negotiations which began on May 17, 1967,[2] that it be afforded the prerogative of unilaterally determining the timing and amount of any future wage increase; (b) promised employees on June 3 that there would be a pay raise in the fall; and, (c) discontinued negotiations with the Union on July 3 and thereafter refused to recognize the Union as the exclusive agent of the employees in an appropriate unit.[3] Respondent admits that it refused to bargain with the Union on and after July 3. However, it defends its conduct on the ground that the Union in fact lacked a majority of employee-designations at all times during which it withheld recognition from the

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[2]Unless otherwise indicated, all dates fall in 1967.

[3]Alternatively, the General Council asserts that, even though the Union might have lost its majority status on and after July 3, this loss was directly attributable to the Company's engagement in the unfair labor practice set forth in (a) and (b) of the text above. I have hereinafter found that Respondent did not engage in those unfair labor practices. Accordingly, I find no merit in this contention.

Union. Additionally, Respondent maintains that it harbored a good-faith doubt as to the Union's majority status on and after July 3, based upon certain objective considerations which had come to its attention, and consequently its failure to deal with the Union on an exclusive basis after that date was legally privileged.

The facts giving rise to this proceeding are not in essential dispute and I find them to be as follows. Pursuant to a Board election conducted on April 11, 1945, the Union was certified on April 19, 1945, as the exclusive representative of all production and maintenance employees, inspectors, and stockroom employees at Respondent's plant, excluding office clerical employees, foremen and assistant foremen, professional employees, guards, and supervisors as defined in the Act.[4] Thereafter, the parties negotiated and executed a series of annual labor agreements, the last of which contained a terminal date of June 26. By letter dated April 22, the Union notified the Respondent of its intention to terminate the existing contract and its desire to commence negotiations for a new one, in consequence of which the date of May 17 was set for the first bargaining session. On that date, the parties met at Respondent's offices. Present on behalf of the Union were George W. Wells, a special representative, Terry Howard, an employee who occupied the post of financial-secretary and treasurer, and Marion Pauling, an employee who was a member of the negotiating committee. Richard Ferguson, vice president in charge of operations, was the chief spokesman for Respondent, and he was assisted by William House, the personnel manager, and Ed Kimbirl, the shop superintendent. When the meeting opened, the Union

[4]The complaint alleges, the answer admits, and I find that this unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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advanced its contract proposals which included a 7 percent wage increase, another paid holiday, additional sick pay, and improvements in vacation benefits. After considering the Union's demands, Ferguson requested that, because of the Company's peculiar operational and financial posture, the Union acquiesce in a 1-year extension of the existing agreement without substantive change. Ferguson explained that Respondent's textile machine sales had fallen off because the slack season had set in, and that it would not be known until late summer or fall whether and to what extent new orders would be obtained. Ferguson further explained that Respondent had enjoyed exceptional sales in the Schlafhorst line for the current fiscal year and anticipated a high level of profits from these sales.[5] However, he noted that Respondent was in the process of erecting a new building in which its equipment was to be moved, and that it was unclear at the time and would not be known until late in the year the extent to which the Schlafhorst profits would be devoured by the new construction. Ferguson concluded by stating that the Company intended to survey its profit position in the fall and he expressed the hope that, after this appraisal, it might be possible to afford all employees increased wages, cash bonuses and other fringe benefits by the year's end. Wells advised Ferguson that the Union was unwilling to extend the contract without any change in its terms, and suggested that the latter take the matter back to his office and give further consideration to the Union's proposals. Ferguson agreed to do so, but expressed the opinion that the Respondent could not presently alter its stance. Before the

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[5]Respondent manufactures and sells textile machinery such as gear boxes and labor-saving devices for the textile industry in the United States. As another facet of its business, it acts as a sales representative in this Country for a German textile machinery firm known as the Schlafhorst Company.

discussion terminated, the parties explored such topics as maintaining a parity of wage rates when the Federal Minimum Wage was escalated in February 1968, Pauling raised a question regarding Respondent's merit rating system, and the Union brought up a matter concerning job descriptions. The meeting terminated with agreement by the parties to reconvene on a later date, June 2, to continue negotiations.

On the afternoon of May 17, Ferguson drafted a notice and a letter to the employees, which were signed by E. A. Terrell, Jr., Respondent's executive vice-president. These were posted on the plant bulletin board, in accordance with past practice, and set forth the Union demands for such items as a wage increase, and enlarged vacation and sick leave benefits, together with a statement of Respondent's position that the existing contract should be extended for another year because of the uncertainty of business prospects and the possibility that calculated profits might produce increased benefits for the employees later in the year.

At the June 2 session, with both sides represented by substantially the same individuals, Wells asked Ferguson whether the latter had reconsidered his position and would be willing to execute an agreement embodying the Union's proposals. Ferguson restated Respondent's concern about the cost of construction of the new plant and the removal of machinery to that installation and mentioned that, although the Company anticipated a profit for the fiscal year 1967, it was as yet uncertain as to the amount of proceeds which would be available for wage increases or other benefits. At this juncture, Wells complained that the employees deserved a wage increase because of the rise in the cost of living, and remarked that the employees should not be asked to forego a wage hike simply because the Respondent was

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moving into new facilities. Ferguson agreed that the employees merited a wage increase but reiterated that the time was not ripe for such a financial move. Ferguson added that Respondent hoped to appraise the situation in October with a design of implementing wage increases at the end of the year. When Wells pressed Ferguson to be more specific about the timing of the raises, the latter stated that, if the Company did grant the increases "it would be some time in the fall, and probably after September 1967." Wells then inquired whether Ferguson would be amenable to sign the existing agreement with a wage reopener, to which the latter replied that the parties had operated under a firm 1-year contract over the course of the years and that the Union's proposals would derogate from this practice. The session ended with Wells commenting that he would conduct a meeting with his members to ascertain their sentiments with respect to Respondent's offer.

On June 3, Respondent assembled its employees to explain to them what had transpired during the negotiations conducted on the previous day. Ferguson recounted that the Company was unable to determine whether it could currently offer a definitive wage increase but would have to await an audit of its financial statement and an assessment of new customer orders. Ferguson assured the men, as he had their representatives, that they might receive a higher wage in the fall.

Following the June 3 meeting, Wells contacted Robert Callaway of the Federal Mediation and Conciliation Service to inform Callaway of the status of negotiations with the Company thus far. In consequence of this conversation, another bargaining session was scheduled at the Service's office for June 23. In the meantime, and on June 22, Ferguson sent a letter to all employees in which he outlined the topics of discussion at the June 3 meeting. The letter

recited that the Company had experienced a good year as a result of the Schlafhorst sales, but cautioned that the prospects for the following year were uncertain and mentioned that this had been brought to Wells' attention. The letter further stated that the Respondent desired a 1-year extension of the existing agreement and advanced the prospect that a pay raise might be feasible by the end of the year. After setting forth the profit figures for prior years, the letter added that the labor agreement between the parties was about to expire and informed the employees that Respondent intended to operate the plant after the contract's termination even if the Union decided to strike the facility.

The June 23 meeting was conducted as scheduled, with Callaway present. Also in attendance for the first time was E. A. Terrell, Jr., Respondent's executive vice-president. Before the session got under way, Wells and Callaway met separately and Wells stated that the Union was willing to recede from its original proposals. Under the Union's revised demands, it indicated a willingness to sign the existing contract provided it contained a provision for reopening the agreement for a review of the wage situation in September or October. On November 1, Respondent would award an increase in an amount to be determined solely by it. In the event that the Union was dissatisfied with the sum offered, it could terminate the agreement on 10 days' notice. When the parties met jointly, Wells reviewed the topics discussed at the two preceding meetings. Wells' new proposals were then considered by the management representatives. After doing so, Terrell testified that he observed that he was unable to gauge at that time what the profit margin would be by September or October because of the uncertainty of future sales and the efficiency factor in manufacturing industrial sales products, and hence he

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stated that he would not agree to a wage-reopener clause or a definite date for a wage increase. It is undenied and I find that Terrell then told Wells that the Company would be willing to sit down with the Union in the fall when all the unknowns had become certainties, and that he would negotiate with the Union concerning the amount of any wage increase or other benefits. A suggestion was made to permit the parties to study the issues and reconvene at a later date. As the contract was due to expire on June 26, the possibility of a meeting on that day was explored but, inasmuch as Wells had other commitments, the next session was set for July 3 with Wells' assurance that the Union would not engage in a strike prior to that date. However, before the meeting broke up, Mediator Callaway inquired into the numerical size of the appropriate unit, to which Wells replied that there were "around 60 or 65" men within the unit.[6] According to Wells, the figure was based upon information which he had received from the Union committee, and he had not consulted any of the Union's records before he answered. When Terrell heard this, he corrected Wells and stated that there were 90 men in the certified unit. The meeting then terminated.

On June 26, Respondent mailed another letter to its employees in which it set forth the latest Union proposals and Respondent's reaction to them. The letter also advised that another bargaining session was scheduled for July 3, and that Respondent intended to operate its plant in the usual manner despite the fact the existing contract was due to expire on June 26.

After the meeting of July 3 opened at 10:00 a.m., Terrell reviewed the Union's revised proposals and remarked

[6]Wells testified that he placed the figure at 60 to 65. Ferguson and Terrell averred that Wells set the number at 65 or 70. As this variance is not critical to a decision herein, the conflict need not be resolved.

that he did not find them attractive to him. Once more, he requested that the expired contract be extended for another year, with the prospect of a wage award when Respondent's financial position was fully ascertained. At this point, Terrell stated that there was an important issue which needed resolution before negotiations could continue. Terrell testified that he informed Wells of a serious doubt which had arisen in his mind as to the Union's majority due to Wells' assertion on June 23 that there were between 60 and 65 employees in the unit when in fact the number totalled 90. Terrell announced that he would not proceed further with negotiations unless and until the Union demonstrated that it did represent a majority of Respondent's employees. Terrell thereupon gave Wells a list of all the unit employees and suggested that Wells establish by documentary proof to be submitted to an impartial observer that the Union had in fact been designated by a majority of the men. Terrell added that, unless the Union possessed a majority, it would be illegal for the Company to continue negotiating with it. Wells responded that "We very definitely do have a majority; however, we don't think that it's necessary to show proof of majority this late in the game, but if and when we decide to show proof of majority, we will show you in our own way," and Wells remarked that the Union would not open its books to anyone as a matter of principle. Terrell testified that he asked Wells how many members of the Union were encompassed in the unit and offered to renew the old contract without change if the Union was found to represent a majority of employees, but that Wells replied he did not know what the number was. In his testimony, Wells flatly denied that Terrell inquired as to the number of union members at the

July 3 meeting or at any other time.[7] Following this colloquy, Mediator Callaway recommended that Terrell summon Respondent's attorney, William Sturges, to render legal advice in the matter. After Sturges arrived, he informed the gathering that, in his opinion, it would be unlawful for Respondent to enter into an agreement with the Union unless the latter proved its majority. Wells replied that it was perfectly lawful for the Company to deal with the Union in view of its original certification by the Board, and again insisted that the Union was a majority representative. He finally advised the management officials that the Union's current proposals would remain viable for the rest of the week, that the Union would not permit anyone to inspect its records, that an agreement without a reopener clause was unacceptable, and that, if the Union decided to engage in a strike at the plant, it would do so without prior notice. On this note, the meeting ended.

On July 6, Terrell once again mailed a letter to the employees reporting on the status of negotiations. The letter repeated the Respondent's contract proposal, namely, the extension for one year of the recently expired agreement with an appraisal of a possible wage increase in the fall. The document went on to recite that "Because during our negotiations many evidences of opposition to the Union's policies have been shown, including a misunderstanding by the Union of the size of the bargaining unit, we asked the question . . . whether the Union really represented a majority of the employees. We said we were willing to renew the contract if the Union would have an

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[7]Howard testified that, at this meeting, Wells assured Terrell that the Union possessed designations from a majority of the employees, but no mention of numbers was made. Ferguson, who was also present at the session, failed to support Terrell's testimony concerning the latter's inquiry into how many members the Union claimed. I credit Wells' testimony in this regard.

impartial third party to inspect the membership records and report simply that they did have a majority at that time. . . . The Union has refused to provide satisfactory evidence of a majority, and until it does we cannot continue to negotiate with it." The letter concluded with the statement that a work stoppage, if called by the Union, would result in financial hardship for the strikers, and with an announcement that the plant would continue to operate despite a strike.

Wells testified without contradiction and I find that, around the middle of July, he telephoned Callaway to relate that Wells' superiors had decided that the best course to pursue in order to resume negotiations was to demonstrate its majority status to the Respondent, and that Wells was prepared to do so. Callaway told Wells that he would relay this information to the Company. A few days later, Callaway phoned Wells and stated that the former had contacted Respondent's officials and laid before them the Union's card-check offer, but that those officials "had said no, that they were no longer interested in a membership check or anything else, as far as they were concerned the union was out, and they did not intend to recognize it further."

Terrell's testimony on this score is not at essential variance with that of Wells. Terrell noted that he received a telephone call from Callaway on July 31 during which the latter inquired whether Respondent's officials had given any further thought to the bargaining stalemate which had been reached, and whether they had arrived at any new conclusions. Terrell replied that he and his colleagues had considered the matter and were convinced that their position regarding the contract proposals was a proper one and would not be altered. Callaway commented that, if Respondent would agree to grant a wage increase in an

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unspecified amount in January 1968, he believed that the Union would be willing to produce evidence of its representational status. Terrell responded that "as far as making any changes in our position, as far as that was concerned, we didn't see any at that time, but that we would do exactly what we said we would, which was to review the situation in the fall, and to make changes if we could, then." Terrell inquired whether this proposal came from Callaway or from the Union, and when Callaway stated that the proposal was of his own invention, Terrell remarked that he would consider the proposition. During the first week in August, Terrell contacted Callaway. Terrell informed Callaway that Respondent had given full and careful consideration to the proposal which Callaway had proffered and that, because "of the pressure that had been reported to us, and the activities reported to us, we did not feel a check of any records at that time would give an uncoerced, unbiased view of what the desires of the employees were, and that we were not interested in any reference to it at that time." When pressed as to the nature of the "pressure" and "activities" which prompted him to refuse to test the Union's majority, Terrell avowed that he had heard "The reports of remarks made by employees as to pressure they felt under the situation where a strike had been threatened, [that] was the primary reason." Terrell was queried as to whether these anxieties had been expressed by employees who were union members, and initially replied that "I had it reported to me that employees who were union members or said they were, expressed concern at the activities of the Union, and the strike talk, and that they did not wish to participate in a strike." However, he then conceded that the "reports" were merely rumors of the possibility of a strike, that a strike never eventuated, and that none of the rumors came from the lips of any member of the Union. Moreover, Terrell allowed as how he never

contacted the Union to demand that it demonstrate its majority, and admitted that he was not interested after July 3 in ascertaining whether or not the Union represented a majority of his employees.

At the conclusion of his conversation with Callaway in early August, Terrell informed Callaway that Respondent had decided that business conditions were sufficiently promising to justify the award of a wage increase in the fall. Terrell added that, by October 10, all of the relevant information concerning Company profits would be available and that he would make an announcement on that date to the employees regarding when and in what amount the increase would be granted. So far as this record stands, this intelligence was never communicated to the Union and the Union was never given an opportunity to bargain again over the matter of the award.

On August 7, Terrell addressed still another letter to his employees. This letter conveyed Callaway's inquiry as to whether Respondent would be willing to renew the old contract with a provision for a wage increase in January 1968 in return for the Union's production of evidence of its representative status. Terrell further commented that "It was clear at the time we made our original request [the July 3 meeting] that the union did not represent a majority, and we sincerely doubt that an uncoerced majority of our employees now really wish to be represented by the union. Therefore we are not interested in any record check at this time, as we do not believe it would represent the true choice of our employees." The letter concluded with the information that Respondent would make known on October 10 the amount of the wage increase which it had decided to grant in the fall.

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On the same day, Wells dispatched a letter to Ferguson which was received by Respondent on August 9 and in which Wells requested that management officials meet with the Union as early as possible to continue current contract negotiations. Ferguson responded on August 15 by stating that "We do not believe . . . that your union represents a majority of our employees in an appropriate unit. We therefore decline to meet with you." The refusal by Respondent to continue negotiations triggered this litigation.

As chronicled heretofore, Respondent claims that it was lawfully privileged to deny exclusive recognition to the Union on and after July 3 on dual grounds. First, it asserts that the Union did not in fact represent a numerical majority of the employees during that period. Second, Respondent contends that it possessed a good-faith doubt of the Union's majority based upon various objective facts and considerations which had come to its attention on and before July 3, and therefore it was justified in refusing to bargain with the Union for this reason.

Before turning to a consideration of the Company's initial claim, certain legal guidelines should be noted. It is now well-grounded in the law that, where a labor organization has been certified by the Board and recognized by the employer over the years, as in this case, a rebuttable presumption arises that the Union's majority continues to prevail unless it is shown to have been lawfully dissipated. Under prevailing precedent, aught that the General Counsel need plead and prove is that the labor organization involved had obtained a Board certification which continued in effect, after which the employer must shoulder the burden of demonstrating that the union is not entitled to recognition

by virtue of a defection from its ranks.[8] For a reason not apparent on this record, the General Counsel chose not to follow this procedure but, instead, undertook during his case-in-chief to establish the Union's numerical majority on and after July 3 by proof of membership rather than by reliance on its prior certification. In my opinion, he has nevertheless succeeded in doing so.

The record establishes and I have found that, at the meeting at 10:00 a.m., on July 3, Respondent provided the Union with a list containing the names of the 90 employees in the appropriate unit. At the hearing, the General Counsel placed in evidence 41 dues' ledger cards and 6 union authorization cards, purportedly making 47 designations in favor of the Union on July 3. Because an individual named William Grayder did not appear on the list submitted to the Union, or on Respondent's payroll as of July 3, the General Counsel agreed to withdraw Grayder's designation, reducing the Union's majority to 46. In addition, the parties stipulated that the designation of employee Roger Locklear should be disregarded due to the uncertainty as to when he joined the Union, thus lowering the Union's membership figure as of July 3 to 45. Finally, the parties agreed to include employee Terry Howard among the union members. Hence, the General Counsel maintains that the Union represented 46 employees on July 3, out of 90 in the appropriate unit, numerically a majority. However, Respondent asserts that three of the authorization cards do not constitute valid designations on the critical date, namely, those of Alfred Pettis, Earnest Lee Kilgo, and Perry Hudson.

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[8]See *Celanese Corporation of America*, 95 NLRB 664, 672; *Frito-Lay, Inc.*, 151 NLRB 28, 33.

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Pettis testified that he executed his card on June 30 at the behest of employee Carl Surber while at work that day, and returned it to Surber the following morning, Saturday, July 1. Personnel Manager House testimonially related that Pettis' timecard shows that the latter did not work on July 1. Accordingly, Respondent advances the argument that Pettis could not have turned the card over to Surber on that day, and that there is thus no probative evidence to establish that Pettis was a Union member on July 3 when Respondent rejected the Union's bargaining demand. Respondent misconceives the thrust of Pettis' testimony. While he stated that he "worked with" Surber and conveyed the card to Surber on July 1, there is nothing in Pettis' averments to indicate that the transaction took place *at the plant* on this date, nor is there any evidence to show that Surber was on the job on July 1.[9] I therefore am convinced and find that Pettis was both truthful and accurate when he testified that he executed the authorization card on June 30 and returned it to Surber on July 1, and that it constitutes a valid designation in favor of the Union.

Kilgo testified that he filled out his card on July 3 at the solicitation of Surber and returned it to the latter on the same day. Kilgo placed the signing "in the afternoon before" he left work. The record shows that he paid his Union dues for the months of July, August, and September. Respondent claims, and I find, that as the final bargaining session of July 3 was conducted in the morning, Kilgo's designation did not become effective until after that meeting had been concluded.

Hudson's authorization card bears a date of July 3. When asked on direct examination whether he executed the card

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[9] I would note that neither House nor any other Company official who was called to testify claimed that Surber was on duty at the factory on July 1.

on that day, he replied, "I guess so." On cross-examination, Hudson could not remember whether in fact he signed the card on July 3, nor could he remember the time of day when he appended his signature to it. However, it is undenied that he paid his Union dues for the months of July, August, and September. Respondent contends that, accepting the assumption that Hudson signed his card on July 3, there is no demonstrative evidence in this record that his signature was obtained prior to the meeting between Respondent and the Union on that date. I concur in this contention and find that the General Counsel has failed to prove that Hudson's authorization card was procured by the Union prior to the bargaining session on July 3 when Respondent rejected the Union's recognitory demand. I therefore find and conclude that at 10:00 a.m. on July 3, when the last negotiating meeting was held between the parties and Respondent declined to continue the bargaining colloquy except upon proof of the Union's exclusive status, the Union possessed only 44 valid designations from the 90 employees, certainly not a majority.

However, inquiry into the propriety of Respondent's conduct on and after July 3 does not end with this happenstance. It is undisputed and I have found that Kilgo submitted his signed card to the Union following the meeting on July 3. It is also uncontroverted and I have found that Hudson paid his union dues for the month of July and, although it has not been evidentially established with any degree of certainty on what date during that month he joined the Union, it seems clear and I find that, by the payment of dues, Hudson became a union member at some time during the month of July. I therefore find and conclude that the Union was possessed of a majority of the

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employees' designations following the July 3 session and at least on July 31.[10]

When Respondent broke off negotiations on July 3, the Union had not abandoned its representational claim. Indeed, it is undenied and I have found that, around mid-July, Wells contacted Mediator Callaway to report that the Union was agreeable to lay open its membership rolls for inspection by an impartial observer to determine its majority status if this action would induce Respondent to resume its place at the bargaining table. Callaway transmitted this intelligence to Terrell on July 31 and the former received an inconclusive response on that date and a negative one on August 7 when Terrell told Callaway that "we did not feel a check of any records at this time would give an uncoerced, unbiased view of what the desires of the employees were, and that we were not interested in any reference to it at that time." I therefore find and conclude that the Union continued to press its demand for recognition after July 3 at a time when it represented 45 of the 89 unit employees, that Respondent was fully appraised of the Union's desire to perpetuate negotiations, and that Respondent refused to meet and deal with the Union. I therefore conclude that the Union in fact represented a mathematical majority of the unit employees in the latter part of July, a period during which Respondent was asked and refused to deal with the Union concerning the wages, hours,

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[10]The addition of Kilgo and Hudson to the Union's membership rolls following the July 3 meeting, and the absence of any evidence that the size of the unit had meanwhile increased, preserved the Union's majority of 46 out of 90 employees during the month of July. However, Respondent points out that employee Maurice Carter, a Union member who is included in the figure of 46, left its employ on July 7. Respondent can draw little solace from Carter's departure for, upon his termination, this reduced the number in the unit to 89. At this juncture, the Union's strength totalled 45 of the 89 unit employees, also a majority.

and other terms and conditions of employment for its employees.

As heretofore found, Wells sent a letter to Ferguson on August 7 demanding a renewal of negotiations which the latter declined by reply dated August 15. Respondent argues that Ferguson's rejection of the Union's demand at this time did not impose any statutory liability upon it because, as stated in Respondent's brief filed with me, "There is no evidence to show who or how many employees comprised the unit on August 7." In support of this argument, Respondent claims that the membership of Corum Harris and Bruce Kepley lapsed in August, and that employees William Helms and Rufus Combs testified that they did not remit their dues to the Union after July. Accordingly, Respondent asserts that the Union's majority during August was suspect and that at most it represented only 41 of 89 employees in the unit during that month. The dues' ledger card of Harris, which was maintained by Financial- secretary and Treasurer Howard in the normal course of business and was introduced into evidence, shows that Harris was initiated into the Union in June, and that he thereafter paid his dues for the full months of July and August. Kepley's record indicates that his initiation took place in May and he paid his dues for the months of June and July, but not thereafter. However, Howard testified without contradiction and I find that, pursuant to the Union's internal procedures, a member is permitted to remain in arrears of dues for a period of 3 months before his membership in that organization is cancelled. As the record fails to show that either Harris or Kepley formally resigned from the Union during that 3-month period, I find that Harris continued to be a member through November and that Kepley remained on the Union's rolls until the end of October. With respect to Helms, he testimonially

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expressed his belief that he did not pay any union dues after July. Yet, his dues' ledger card which was introduced into evidence, demonstrates that he was initiated into the Union in July and paid his dues for the months of July and September, but not for August. Combs also testified that he paid dues for the month of July, but not thereafter. Here, again, Combs must have been mistaken for his ledger card establishes that he paid an initiation fee in July, did not pay any dues for August, but did remit dues for the months of September and October. In view of the foregoing, I find and conclude that the Union retained a numerical majority of 45 out of the 89 employees in the unit after it makes its demand for continued recognition by its letter to Respondent dated August 7.

In sum, I find and conclude that, at all times material to this proceeding, the Union in fact represented a majority of Respondent's employees in an appropriate unit.

I turn next to Respondent's defense that, assuming, *arguendo*, the Union did have the support of a majority of Respondent's employees on and after July 3, it was nevertheless vested with a good-faith doubt as to that majority because of certain objective facts and considerations which had come to its attention both before and during negotiations. In *Laystrom Manufacturing Co.*,[11] the Board reiterated the character of proof which must be adduced to support this defense. It noted:

> After the first year [a Board] certificate still creates a presumption of majority status, but the presumption is normally rebuttable by an affirmative showing that the union no longer commands a majority. (footnote omitted) Moreover, where the certificate is a year or more

[11] 151 NLRB 1482, 1483-4.

> old an employer may withhold further bargaining without violating the Act and insist that the union reestablish its statutory representative status if, but only if, he in good faith has a reasonable doubt of the union's continuing majority. (footnote omitted)
>
> A showing of such doubt, however, requires more than an employer's mere assertion of it and more than proof of the employer's subjective frame of mind. The assertion must be supported by objective considerations. The applicable test, as defined in the *Celanese* case, (95 NLRB 644), is whether or not the objective facts furnish a "reasonable basis" for the asserted doubt, or, put another way, whether or not there are some reasonable grounds for believing the Union has lost its majority status since its certification. (footnote omitted)

Executive vice-president Terrell, who has been associated with Respondent since the Union's original certification in 1945, testified that the "first serious doubt" about the latter's majority status which he entertained arose at the first bargaining meeting he attended on June 23 when Wells remarked in response to Mediator Callaway's question that there were between "65 or 70" employees in the unit. However, Terrell candidly admitted that he "didn't know why [Wells] said" that the unit was so limited in scope and Terrell believed that the figure advanced was a "mistake or misjudgment" on Wells' part due to the fact that the latter had only been employed by the Union for approximately a year. Terrell attempted further to support his good-faith doubt as to the Union's majority by relating that "specific reports" had reached his ears that the Union's membership ranged from 38 to 40 out of 90 employees in the unit, but then he acknowledged that these reports were "conflicting" and he failed to identify either the source of his information or the basic ingredients of this intelligence. Searching for

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additional bases on which to found his doubt, Terrell recounted that his skepticism over the Union's exclusive status had developed over the years due to "the apparent lack of interest in union membership, and the lack of communication with the union. We never saw any union representatives excepting during negotiations." He finally conceded that the sole report concerning the Union's lack of support among his employees was received in the 1950's.

Ferguson was equally vague as to the basis for Respondent's belief that the Union did not command the adherence of a majority in the unit when Respondent decided to withhold recognition on and after July 3. He testified that, prior to the bargaining session on June 23 when Wells commented there were between 65 and 70 individuals in the unit, he and Respondent's officials had a "general feeling" that the Union lacked a majority and that this feeling crystallized into certainty when Wells made his comment on June 23. However, Ferguson admitted that Respondent's doubt was predicated on contradictory and unsubstantiated rumors. Thus, he reported that, prior to the commencement of negotiations in May, he was told by Shop Superintendent Kimbirl that the latter "had heard" from three employees that they "did not feel like our union was active enough, they wanted to get another union in there." Then, on June 6, Ferguson learned from Production Control Manager Tolbert that the Union had obtained six new members and that acquisition brought the number of Union adherents in the unit to 100 percent. On June 15, Ferguson was informed by a Supervisor Deaton that the Union had acquired 15 additional members because Respondent had altered its employees' coffee break. On the same day, Kimbirl notified Ferguson that the Union had admitted 60 employees into membership. Finally, Ferguson heard on June 16 that there were between 38 to 40 men in the Union.

Despite the receipt of the foregoing "rumors," as both Ferguson and Terrell put it, and although Respondent obtained advice of counsel before it decided to refuse to continue negotiations with the Union on and after July 3, Respondent concededly declined to file a representation petition with the Board to test the Union's majority in a secret election.

After a full review of the evidence which Respondent introduced on this issue, I find and conclude that Respondent has failed to sustain its burden of showing by "objective considerations" that "reasonable grounds" existed concerning the Union's lack of majority support which would justify its failure to accord continued recognition to that labor organization, under the precepts outlined in *Laystrom Manufacturing Co.*[12]

I have heretofore found, contrary to the General Counsel's contention, that the Union did not represent a majority of Respondent's employees when the latter's officials walked out of the bargaining room on July 3 and refused to recognize the Union. However, I have also found that employee Kilgo executed his authorization card on the afternoon of July 3, following the last negotiating session, and that employee Hudson became a union member during the month of July, making the Union's majority designation as of July 31 a figure of 45 out of 89 in the unit on that date. I have further found that the Union maintained that majority during the month of August when the Union requested that Respondent resume negotiations and when Respondent declined to do so. Accordingly, I conclude that the Union in fact represented a majority of Respondent's employees in the appropriate unit on July 31 and that Respondent did not harbor a good-faith doubt of the

[12]See note 10 *supra.*

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Union's exclusive status when it refused to continue the bargaining colloquy. By the foregoing conduct, I conclude that Respondent thereby violated Section 8(a) (5) of the Act.

The complaint alleges that Respondent further violated Section 8(a) (5) by insisting "throughout negotiations" that it be permitted unilaterally to determine the size and timing of any wage increase and by promising its employees on June 3 that they would be afforded a raise in the fall. As heretofore found, at the June 23 bargaining meeting Terrell told Wells that the Company would be willing to sit down with the Union in the fall when Respondent's financial resources were known and that Terrell would then negotiate with the Union concerning the amount of any wage increase or other benefits. Wells testified that, at the June 2 bargaining session, Ferguson did not indicate one way or the other whether the amount of any future increase would be negotiable. Terry Howard, the Union's financial-secretary and treasurer, testified that, in the course of negotiations, Respondent stated that there "probably" would be a wage escalation later in the year, but Howard did not deny that the Company gave the assurance that it would bargain over the raise. Marion Pauling, the only witness called by the General Counsel to report on the June 3 convocation by Ferguson, proclaimed that Ferguson did not promise that there would be a wage increase in the fall, and he added that no such proffer was made at any time during negotiations. In light of the foregoing testimony, as well as Wells' testimonial acknowledgment that, at the June 23 meeting, he expressed a willingness to grant license to Respondent unilaterally to ascertain and award a wage increase for its employees, and in view of Terrell's undenied testimony that he promised to negotiate the amount of the increase in the fall

when business conditions stabilized, I find and conclude that the General Counsel has failed to sustain his burden of proof that Respondent insisted throughout negotiations which terminated on July 3 that it be permitted unilaterally to fix the size and time of a pay award, and that Respondent promised employees on June 3 that they would receive such an award toward the end of the year.

However, I have also found that at all times material herein the Union in fact represented a majority of the unit employees, particularly on August 7 when the Union requested that Respondent resume negotiations, and that Respondent did not entertain a good-faith doubt as to the Union's majority status. As heretofore found, Terrell informed Mediator Callaway on August 7 that the Company had unilaterally decided to announce to the employees on October 10 when and in what amount it would award a wage increase. As the Union was the exclusive representative of Respondent's workers on August 7, I find that Respondent was statutorily bound to consult with and bargain with the Union timing and amount of the raise which it would grant. By failing to do so, I conclude that Respondent thereby offended the provisions of Section 8(a) (5).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and free flow thereof.

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V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, I will recommend that the Respondent, upon request, bargain collectively with the Union as such representative and, if an understanding is reached, embody said understanding in a signed agreement.

Having found that the Respondent unilaterally announced to its employees the date on which it would determine the timing and award of a wage increase without prior consultation with their duly designated bargaining agent, I will recommend that Respondent bargain with the Union concerning the timing and award of any future wage increase.

Upon the basis of the foregoing findings of fact and conclusions and the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, inspectors, and stock room employees at Respondent's plant in Charlotte, North Carolina, excluding office clerical employees, foremen and assistant foremen, professional

employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union, upon request, concerning the wages, hours, and other terms and conditions of employment for employees in the aforesaid bargaining unit, and by unilaterally announcing the date on which it would determine the timing and award of a wage increase without prior consultation with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent, Terrell Machine Company, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Upon request, refusing to bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

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(b) Unilaterally announcing the date on which Respondent would determine the timing and award of wage increases without prior consultation with the Union.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the following appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and, if any understanding is reached, embody such understanding in a signed agreement:

All production and maintenance employees, inspectors, and stock room employees at Respondent's plant in Charlotte, North Carolina, excluding office clerical employees, foremen and assistant foremen, professional employees, guards, and supervisors as defined in the Act.

(b) Post at its plant in Charlotte, North Carolina, copies of the notice attached hereto and marked Appendix.[13]

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[13]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words A DECISION AND ORDER." [Footnote number corrected.]

Copies of said notice, to be furnished by the Regional Director for Region 11, shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply therewith.[14]

Dated at Washington, D. C.

MAX ROSENBERG
Max Rosenberg
Trial Examiner

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A
TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

[14]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith." [Footnote number corrected.]

we hereby notify our employees that:

WE WILL NOT refuse, upon request, to bargain collectively with INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 1725, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

WE WILL NOT unilaterally announce the date on which we will determine the timing and award of wage increases without first consulting with the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, or to join or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL bargain collectively, upon request, with the above-named labor organization as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, inspectors, and stock room employees at our plant in Charlotte, North Carolina, excluding office clerical employees, foremen and assistant foremen, professional employees, guards, and supervisors as defined in the Act.

All our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

TERRELL MACHINE COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101 (Tel. No. 723-2392).

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TERRELL MACHINE COMPANY AND INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 1725	Case 11-CA-3422

DECISION AND ORDER

On July 3, 1968, Trial Examiner Max Rosenberg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommen-

dations of the Trial Examiner, with the following additions and qualifications.

As more fully set forth in the Trial Examiner's Decision, the record shows that a continuous collective-bargaining relationship preceded the relevant events of 1967. In 1945, the Union was certified as the unit employees' exclusive bargaining representative, pursuant to a Board election earlier that year. The Union and the Respondent subsequently executed consecutive annual agreements. The last expired June 26, 1967. That year, negotiations for another began on May 17. Further sessions were held on June 2, June 23, and July 3.

The Respondent admittedly refused to bargain on July 3. At the meeting that date, it resumed discussion of outstanding substantive proposals; and having outlined its position, it expressed for the first time a doubt of the Union's majority representative status. The Respondent then conditioned its willingness either to execute any contract or to proceed any further with negotiations on a showing by the Union that it still represented a majority of the unit employees. The Union's representative replied by refusing to "show proof . . . this late in the game"; asserting the Union's right to recognition and bargaining, he pointed to the Board's original certification.

On July 6, in a letter to its employees, the Respondent reiterated the announced condition without which it would not resume negotiations:

> We said [at the July 3 meeting] we were willing to renew the contract if the Union would have an impartial third party . . . inspect the membership records and report simply that they did have a majority at that time . . . The Union has refused to provide satisfactory evidence

of a majority, and until it does we cannot continue to negotiate with it.

Thereafter, the Union decided it could best get negotiations resumed by acceding to the Respondent's demand. Accordingly, it informed the Respondent, about mid-July, that it was willing to demonstrate its majority representative status. To this end, it offered to make documentary evidence available for inspection. The Respondent, however, now declared its unwillingness to recognize the Union any further and refused even to consider the proffered showing.

On August 7, the Respondent addressed another letter to its employees. The letter said, in part, "[W]e are not interested . . . at this time," in seeing the Union's offered evidence of its majority representative status. The letter also announced that the Respondent had decided (unilaterally) to grant a wage increase in the fall. On the same date, the Union sent the Respondent a written request that negotiations be resumed. The Respondent received the request August 9, and answered it August 15. In its reply, the Respondent unconditionally refused to meet again. The instant litigation followed.

The complaint alleged among other things that the Respondent's refusal, beginning July 3, further to recognize the Union as the exclusive collective-bargaining representative of the unit employees, violated Section 8(a)(5) of the Act. That allegation is amply sustained by the evidence in this record.

It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttal presumption that its majority representative status continues.[1] This presumption is designed to promote stabil-

[1] *Celanese Corporation of America*, 95 NLRB 664, 671-2.

ity in collective-bargaining relationships, without impairing the free choice of employees.[2] Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status;[3] or (2) that the employer's refusal was predicated on a good faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i. e., "good faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations[4] and it must not have been advanced for the purpose of gaining time in which to undermine the union.[5]

In applying the above principles to this case, the Trial Examiner construed the General Counsel's position during the hearing to be only that on July 3, the Union was the majority representative of the employees based on the number of Union members on that date, without reliance on the presumption that the Union continued to enjoy majority representative status. For that reason, the Trial Examiner looked to the membership records and the signed

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[2]Id.

[3]"Majority representative status" means that a majority of employees in the unit wish to have the union as their representative for collective-bargaining purposes. *Id.*

[4]See *Laystrom Manufacturing Company*, 151 NLRB 1482, 1484, enforcement denied on other grounds (sufficiency of evidence), 359 F. 2d 799 (CA 7, 1966); *United Aircraft Corporation*, 168 NLRB No. 66, at TXD 13; *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F. 2d 588 (CA 5, 1966), enforcing 147 NLRB 997. And cf. *United States Gypsum Company*, 157 NLRB 652.

[5]*C & C Plywood Corporation, et al.*, 163 NLRB No. 136; *Bally Case and Cooler, Inc.*, 172 NLRB No. 106.

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designation cards and concluded that in fact fewer than a majority of the employees had designated, or were members of, the Union as of the morning of July 3, and hence the Respondent was not obligated to bargain on that date.

As we read the record, the Trial Examiner incorrectly interpreted the General Counsel's contentions. It is clear from the broad allegations of the complaint and the General Counsel's statements throughout the hearing that the General Counsel, in fact, sought to rely on both the presumption of continued majority representative status and the supplementary evidence of the Union's membership figures and designations. Futher, contrary to the Trial Examiner, we find, for the reasons set forth below, that on July 3, the Union continued to be the majority representative of the employees in the unit. Thus, on the facts of this case, the presumption of continued majority status was operative, and it was incumbent upon the Respondent to go forward with the evidence to establish actual loss of such status, if it wished to rebut that presumption. Of course, if the General Counsel's evidence refuted his own contention, that would undoubtedly be sufficient. But that is not the case here. For, a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union.[6] There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof. Accordingly, the Trial Examiner's finding here that on July 3, only 41 of the 90 employees in the unit were dues-paying members does not

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[6] *United Aircraft Corporation, supra,* at TXD 11-13; *N.L.R.B.* v. *Gulfmont Hotel Company, supra.*

justify his conclusion that on that date the Union did not represent a majority of the Respondent's employees. Therefore, we find, the presumption of the Union's representative status on and after July 3 has not been rebutted.

There remains for consideration, however, the question whether the Respondent was nevertheless justified in refusing to bargain because of a good faith and reasonably grounded doubt of the Union's continuing majority status.

The Trial Examiner discussed the asserted bases for the Respondent's claim of doubt and concluded that the Respondent did not have a reasonable doubt "when it refused to continue the bargaining colloquy." Inasmuch as the refusal first occurred on July 3, but the Trial Examiner found an obligation to continue bargaining after July 31, the time to which that holding applies is ambiguous. However, it is apparent from the record that the Respondent at no time had objective grounds which justified its refusal to continue negotiations. Rather, the evidence shows that its claim of doubt was advanced in order to circumvent its legal obligation to negotiate with the Union.

As indicated above, there were 90 employees in the unit on about July 3; during the meeting on June 23, the Union representative remarked there were between 65 and 70 in the unit. The Trial Examiner discussed and correctly rejected the Respondent's claim that this misstatement, together with a report in May by the Shop Superintendent that he had heard from three employees that they did not feel the Union was active enough and various rumors concerning the number of members in the Union, raised a reasonable doubt and justified its refusal to continue bargaining. In addition, however, the Respondent also claimed that it relied on (1) an opinion received June 15 from a night shift supervisor that he did not think three named

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Union members would strike; (2) undetailed rumors from unidentified sources that unrest and dissatisfaction existed with the way the Union was running things; and (3) the Respondent's conclusion (according to the testimony of Vice-President Ferguson) that it was "hard to understand how our employees could pay their money into a union which as far as we could see was doing them no good . . ." It is patent that none of the assertions, either separately or collectively, support the showing that the Respondent is required to make. To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf.[7] There is no such evidence in this case.

Under all the circumstances, we conclude that the reasons asserted by the Respondent were insufficient to show a reasonable basis for doubting the Union's continued majority.[8] On the contrary, we are persuaded that the evidence establishes that the Respondent asserted its doubt in order to avoid bargaining with the Union. Thus, although the Respondent said that it was refusing to bargain until the Union agreed to a check of its records and so informed the employees, it flatly rejected the Union's offer when made, stating unequivocally that it had no interest in learning whether the Union represented a majority and that it was "no longer interested in a membership check or anything else. . . ."[9] The Respondent continually acted in this

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[7] *United Aircraft Corporation*, 168 NLRB No. 66, at TXD 12-13.

[8] *United Aircraft Corporation, supra*; *Kentucky News, Incorporated*, 165 NLRB No. 119

[9] The Respondent's refusal to look at the Union's evidence, assertedly because of rumors and reports of Union coercion in securing employee signatures, was supported only by conclusionary testimony of such reports. The Respondent also claims that it believed, based on

(Continued)

inconsistent fashion, claiming to desire substantiation of majority status but rejecting any offer to show such status, from July 3 through August 7. Moreover, we note that the Respondent could have filed a petition for an election, or asked that the Union do so, in order to resolve its alleged doubt, but it took no such steps. These facts, viewed in light of the absence of any objective basis for its claimed doubt,[10] lead to the inevitable conclusion that the Respondent's assertion of an interest in what it called a satisfactory showing of majority status was, in fact, a pretext to conceal its desire to eliminate the Union. For, although the Respondent purported to justify its withdrawal of recognition on the basis of an asserted doubt, it simultaneously precluded the possibility of that doubt being resolved—under circumstances wholly inconsistent with good faith.

In sum, the Respondent had no basis for doubting the Union's continued majority representative status—only, perhaps, its membership figures—and the doubt as to such status was not based on reasonable grounds and was asserted in bad faith. For these reasons, the Respondent, in breaking off negotiations on July 3 and thereafter refusing to resume bargaining with the Union, acted contrary to its statutory duty and violated Section 8(a)(5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the

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a rumor, that a strike was possible, but because it never occurred the Respondent concluded that the Union had lost majority employee support even assuming it had existed before. Patently, this type of evidence affords no support for the Respondent's claim that it was justified in its adamant position.

[10] *Cf. The Richard W. Kaase Company*, 141 NLRB 245, 247-8.

Trial Examiner, as modified herein,[11] and orders that the Respondent, Terrell Machine Company, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 1(b) and insert in its place the following:

   (b) Unilaterally deciding, without prior consultation with the union, the award and timing of wage increases.

2. Substitute the NOTICE TO ALL EMPLOYEES, attached hereto as APPENDIX, for that recommended by the Trial Examiner.[12]

Dated, Washington, D. C. Jan. 3, 1969

Frank W. McCulloch,	Chairman
John H. Fanning	Member
Gerald A. Brown	Member

(SEAL)

[11]The Trial Examiner found that the Respondent unilaterally decided to increase wages in the fall of 1967; and to announce on October 10 how much the increase would be, and when it would be granted. He concluded, and we agree, that these unilateral *decisions* — as to whether, in what amount, and when to make this increase — violated Section 8(a) (5). Yet, his phrasing of paragraph 1(b) in the Recommended Order inadvertently focuses on unilateral *announcements*. We accordingly correct paragraph 1(b) in the Order.

[12]We believe the policies of the National Labor Relations Act will best be promoted by a Notice which, in readily understandable language, informs employees of their rights, how these were violated, and how the violations are being remedied. *J. P. Stevens & Co., Inc.*, 167 NLRB No. 37; *Genuardi Super Markets, Inc.*, 172 NLRB No. 121; *Lipsey, Inc.*, 172 NLRB No. 171; *Volkswagen De Puerto Rico, Inc.*, 172 NLRB No. 225; *Northwest Oil Equipment, Inc.*, 173 NLRB No. 86.

NATIONAL LABOR RELATIONS BOARD

NOTICE TO ALL EMPLOYEES*

THIS NOTICE IS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL AT WHICH ALL SIDES HAD THE CHANCE TO GIVE EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD FOUND THAT WE, TERRELL MACHINE COMPANY, VIOLATED THE NATIONAL LABOR RELATIONS ACT. THE BOARD THEREFORE ORDERED US TO POST THIS NOTICE.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To engage in self-organization;

To form, help or join unions;

To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection; and

To refrain from any or all of these things.

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

* * *

THE NATIONAL LABOR RELATIONS BOARD FOUND:

1. That the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

AFL-CIO, LOCAL LODGE NO. 1725, is the Union you have chosen as your collective-bargaining representative.

2. That we refused to bargain with this Union about your wages, hours, and other conditions of employment.

3. That when we refused to bargain, we were advised you had chosen it is your collective-bargaining representative, and had no reason to doubt this was true.

THE BOARD RULED that our refusal to bargain with the Union under these circumstances violated your legal rights under the National Labor Relations Act.

ACCORDINGLY, WE GIVE YOU THESE ASSURANCES:

WE RECOGNIZE the INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 1725, as the exclusive bargaining representative — with respect to wages, hours, and other conditions of employment — of all employees in the appropriate bargaining unit.

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* This Notice is addressed to all employees whose jobs make them members of the "bargaining unit" which — according to a National Labor Relations Board ruling — is the "appropriate" bargaining unit. *The employees in this bargaining unit are*:

All production and maintenance employees, inspectors, and stockroom employees at our plant in Charlotte, North Carolina.

This bargaining unit excludes:

All office clerical employees, foremen and assistant foremen, professional employees, guards, and "supervisors" as defined in the National Labor Relations Act.

WE WILL NOT refuse, upon request, to bargain collectively with your Union concerning wages, hours, and other conditions of employment.

WE WILL NOT decide — without first consulting your Union — whether or not wages will be increased.

NOR WILL WE decide — without first consulting your Union — when to increase wages.

WE WILL, as stated, bargain with your Union upon request.

IF, AFTER BARGAINING, we agree with your Union as to wages, hours and other conditions of employment, WE WILL embody the agreement in a signed contract.

TERRELL MACHINE COMPANY

(Employer)

Dated ..... By .....

(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice may be directed to the Board's Regional Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101 Telephone 919—723-2392.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,371

TERRELL MACHINE COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross Petition for Enforcement of an Order of the National Labor Relations Board.

(Argued December 2, 1969 Decided January 20, 1970)

Before SOBELOFF and WINTER, Circuit Judges, and HARVEY, District Judge.

William W. Sturges (Weinstein, Waggoner, Sturges & Odom, on brief) for Petitioner, and Thomas E. Silfen, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and John D. Burgoyne, Attorney, National Labor Relations Board, on brief) for Respondent.

WINTER, Circuit Judge:

Terrell Machine Company seeks to have set aside an order of the National Labor Relations Board based on a finding that it violated §§ 8(a)(1) and 8(a)(5) of the

National Labor Relations Act by refusing to bargain collectively with the representative of its employees and by unilaterally granting a wage increase to its employees after its refusal to bargain. Despite the company's assertions to the contrary, the Board found that, on the crucial date, the union continued to represent a majority of the employees and that the company had no good faith doubt as to that majority. From the record as a whole, those findings are supported by substantial evidence. It follows that the refusal to bargain and the subsequent unilateral grant of a wage increase were violative of the Act, so that as prayed by the Board the order will be enforced.

Terrell admits a refusal to bargain on July 3, 1967, after several bargaining sessions. Its justification was that either the union did not represent a majority of the employees on that date or the company had a good faith doubt as to that majority status.

The trial examiner found that on July 3, 1967, the union possessed dues cards and authorization cards from forty-four employees out of a bargaining unit of ninety employees. He concluded that the union thus had no majority. The examiner, however, held that the date July 3 was not crucial and found an unfair labor practice because there was in fact a majority on July 31. On theory, but not result, the Board reversed, holding that July 3 was the crucial date, but that actual membership in the union on July 3 was not the dispositive fact. To find continued majority status on July 3, the Board invoked the rebuttable presumption that majority status continues after expiration of the first year following certification and concluded that a showing of actual membership or payment of dues is not the equivalent of establishing the number of employees who desire representation by the union so as to rebut the presumption.

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The Board was plainly correct. Upon expiration of the original certification year, a rebuttable presumption of representative status exists, and it is sufficient to establish *prima facie* a continuing obligation to bargain.

NLRB v. Rish Equipment Company, 407 F. 2d 1098 (4 Cir. 1969).

See also, *NLRB v. Little Rock Downtowner, Inc.*, 414 F. 2d 1084 (8 Cir. 1969); *NLRB v. Gulfmont Hotel Co.*, 362 F. 2d 588 (5 Cir. 1966). The presumption may be overcome, according to these authorities, if the employer demonstrated that the union, in fact, no longer enjoyed majority support on the date of the refusal to bargain, or that the refusal to bargian was predicated upon a reasonably grounded good faith doubt of majority support. Here neither basis for overcoming the presumption was established.

A showing that less than a majority of the employees in the bargaining unit were members of the union or paid union dues was not the equivalent of showing lack of union support. Manifestly, in the absence of a closed shop agreement—and during the period in question, North Carolina had a state "right to work" law—many employees are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation. Nonetheless, the union may enjoy their support, and they may desire continued representation by it. *NLRB v. Gulfmont Hotel Co., supra. Cf. NLRB v. Darlington Veneer Co.*, 236 F. 2d 85 (4 Cir. 1956).

The Board's conclusion that Terrell did not have a good faith doubt of continued majority support is fully supported by the record as a whole. Because Terrell did not know of the actual minority of union members until after its refusal

to bargain, it cannot rely on that data to support a good faith doubt of continued majority support. Instead, it relied solely on isolated reports from vague or unidentified sources that several employees did not think the union was sufficiently active and wanted another union, that union membership was between 38 and 40 and an incorrect assertion by a union representative that the bargaining unit numbered only 65 to 70 employees. These, we conclude, could not reasonably give rise to doubt as to continued majority support especially when Terrell contemporaneously received contradictory reports that union adherents were up to "100 per cent" and that the union had obtained "60 new members."

Coupled with the lack of a reasonable basis to give rise to doubt was affirmative evidence of lack of good faith on the part of Terrell. Although Terrell publicly stated that it was refusing to bargain only until the union's majority status was proved, it refused to consider the union's proffer to exhibit its record of members and authorizations as evidence of its legitimacy. Terrell never petitioned the Board for a new election, and its unilateral grant of a wage increase in August, 1967, after its previous statement made before it withdrew recognition that it could not consider a wage increase until October, are further evidence of bad faith.

Since recognition was improperly withdrawn, the unilateral grant of the wage increase was in itself a violation of the Act. *Fibreboard Paper Products Corp. v. NLRB,* 379 U. S. 203 (1964); *NLRB v. Katz,* 369 U. S. 736 (1962).

ENFORCEMENT GRANTED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1447

TERRELL MACHINE CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a–48a) has not yet been officially reported. The Board's decision and order (Pet. App. 33a–41a) are reported at 173 NLRB No. 230.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1970 (Pet. 1). The petition for a writ of certiorari was filed on April 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

384-519—70

QUESTION PRESENTED

Whether the majority status of a union which has been certified by the National Labor Relations Board may be presumed to continue upon expiration of the certification year, absent a showing by the employer that (1) the union, in fact, no longer enjoys majority support, or (2) he has reasonable grounds for so believing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at page 2 of the petition.

STATEMENT

On July 3, 1967, after more than 20 years of an uninterrupted collective bargaining relationship (A. 177, 202)[1] and in the midst of contract negotiations, the Company withdrew recognition from the Board-certified representative of its employees, the International Association of Machinists, Local 1725. It stated that the contract negotiations would be resumed only if the Union came forward with documentary proof of its continued majority status (A. 182, 202–203; 107–108). Although the Union initially relied on its 20-year-old Board certification and refused to take this action, about 3 weeks later it consented to prove its representative status in any agreeable manner (A. 182–185, 203; 16, 110–112). The Company responded that, because of certain in-

[1] "A." refers to portions of the record printed as an appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tervening events, it was no longer interested in a check of the Union's majority and categorically refused to deal with it further (A. 184–185, 203; 113, 16). It then unilaterally announced that there definitely would be a wage raise in the next several months (A. 186, 203; 113, 162)—although it had stymied the preceding negotiations by insisting that no wage readjustment was possible (A. 177–179, 181; 75, 77, 80, 83, 107, 163, 167, 169).

On these facts, the Board held that the Company's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act. It found that the Company had no reasonable basis for doubting the Union's continued majority, but had asserted a doubt in order to avoid its bargaining obligation. The Board ordered the Company, *inter alia*, to bargain collectively with the Union, upon request (Pet. App. 39a–40a, 29a).

The court of appeals sustained the Board's findings and enforced its order. The court applied the following rule of law (Pet. App. 47a):

> Upon expiration of the original certification year, a rebuttable presumption of representative status exists, and it is sufficient to establish *prima facie* a continuing obligation to bargain. * * * The presumption may be overcome * * * if the employer demonstrated that the union, in fact, no longer enjoyed majority support on the date of the refusal to bargain, or that the refusal to bargain was predicated upon a reasonably grounded good faith doubt of majority support. * * *

Finding that neither showing had been made here, the court held that the presumption of the Union's continued majority status had not been rebutted (Pet. App. 47a–48a).[2]

ARGUMENT

1. Petitioner neither raised nor litigated in the prior proceedings its basic position here—that it is improper under the Labor Act to presume that an incumbent union, once certified, continues to enjoy majority status. Rather, petitioner argued to the Board and court below only that it had, in fact, effectively rebutted that presumption (Pet. App. 36a–39a, 46a). Thus, the issue which petitioner now seeks to raise is not properly presented. *National Labor Relations Board* v. *Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 350; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 661–662.

2. In any event, the presumption fully accords with the Act, the pronouncements of this Court, and the consistent decisions of the courts of appeals.

[2] With respect to the question whether the Union was supported by a majority of the employees, the court held that the fact that less than a majority were dues-paying members of the Union was not, of itself, "the equivalent of showing lack of union support" (Pet. App. 47a). Many employees who want continued collective bargaining "are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation" (*ibid.*). Accord: *General Electric Co.* v. *National Labor Relations Board*, 400 F. 2d 713, 727, n. 14 (C.A. 5), certiorari denied, 394 U.S. 904; *National Labor Relations Board* v. *Master Touch Dental Laboratories, Inc.*, 405 F. 2d 80, 83 (C.A. 2); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 591–592 (C.A. 5).

Brooks v. *National Labor Relations Board*, 348 U.S. 96, 98–103;[3] *Bally Case and Cooler* v. *National Labor Relations Board*, 416 F. 2d 902 (C.A. 6); *National Labor Relations Board* v. *Little Rock Downtowner*, 414 F. 2d 1084 (C.A. 8); *National Labor Relations Board* v. *Frick Co.*, 73 LRRM 2889 (C.A. 3). The policy underlying this long and unbroken line of precedent is compelling; if employers were free to withdraw recognition at their unrestricted discretion—without any requirement that they demonstrate some reasonable basis in fact for doubting the union's support—long established bargaining relationships and the employee collective rights attendant to them could be groundlessly interrupted and, as a direct result, industrial peace would be seriously jeopardized.

Nor does this presumption have the effect petitioner claims, of elevating rights of organization over the equally protected right to "refrain" from union activity (Pet. 6–7, 10). That is a right of the employees, not the employer. At the initial stage of recognition or certification, a union—whether previously defeated or not—must *always* demonstrate its majority status

[3] Although *Brooks* specifically involved the irrebuttable presumption that a union's majority continues during the initial certification year, the Court also indicated its approval of the challenged Board interpretation that, after the initial year has passed, the presumption remains in effect but becomes rebuttable. *Brooks*, *supra*, 348 U.S. at 104. See also *National Labor Relations Board* v. *C & P Plaza Dept. Store*, 414 F. 2d 1244 (C.A. 7), certiorari denied, 396 U.S. 1058; *National Labor Relations Board* v. *Rish Equipment Co.*, 407 F. 2d 1098 (C.A. 4); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588 (C.A. 5).

affirmatively, either in an election or on the basis of union authorization cards. That is, if anything, a heavier burden than the "good faith doubt" standard imposes upon the employer who withdraws recognition.[4] Moreover, the showing of 30 percent employee interest which a union must make to obtain an election is precisely matched by the rule that the employees themselves (as opposed to the employer) may obtain a decertification election by showing 30-percent employee support. The requirement that an employer must show reasonable grounds for doubting an incumbent union's majority in order to achieve the same objective, see *United States Gypsum Co.*, 157 NLRB 652, is designed to deter groundless election challenges to established representatives, and in no way inhibits the employees' right to refrain from unionism.

Finally, petitioner argues that, under the rule of *Garment Workers* v. *National Labor Relations Board* (*Bernhard Altmann*), 366 U.S. 731, that an employer violates the Act by granting exclusive recognition to a minority union, it had no choice other than to

[4] As petitioner acknowledges (Pet. 6), Section 9(c)(3) of the Act bars the holding of any new representation election where a valid election has been held in the "preceding twelve-month period."

withdraw recognition; and that, because of the "impossible" burden of rebutting the presumption, it could not take that action without violating the law (Pet. 9–10). This supposed "Hobson's choice" is wholly illusory. *Bernhard Altmann* dealt only with the employer's initial grant of recognition to a new union; where, as here, a formally certified representative is involved, the law is clear that the employer may continue bargaining without jeopardy and "petition the Board for a new election or other relief." *Brooks, supra,* 348 U.S. at 104, n. 18. Moreover, if the employer withdraws recognition immediately, he will not encounter the difficult burden of showing "no majority status" (Pet. 9); he need only demonstrate a reasonably grounded good faith doubt—a burden which is well within the employer's competence. See *National Labor Relations Board* v. *Gallaro,* 419 F. 2d 97, 100 (C.A. 2); *United Aircraft Corp.* v. *National Labor Relations Board,* 416 F. 2d 809 (C.A. D.C.); *National Labor Relations Board* v. *Laystrom Mfg. Co.,* 359 F. 2d 799 (C.A. 7). Petitioner was unable to sustain that burden here because the record shows that its claimed doubt was asserted, not in good faith, but in an effort to destroy the bargaining relationship (see *supra,* pp. 2–3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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